In the Supreme Court of the United States

October Term, 1963

No. 525

MORTON SALT COMPANY, a corporation, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This is an income tax case involving the amount of percentage depletion allowance assignable to taxpayer's salt for the years 1951 through 1954. The allowance is a specified percentage (5 percent for the years 1951 through 1953; 10 percent for 1954) of the "gross income from mining"; "mining" is in turn defined as including not merely the extraction of the mineral from the ground but also "the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products * * *." (See Section 114(b)(4) of the Internal Revenue Code of

1939, 26 U.S.C. 1952 ed., Sec. 114; Section 613 of the Internal Revenue Code of 1954, 26 U.S.C. 1958 ed., Sec. 613). Thus, the cutoff point to "mining" must be determined as to any given mineral before the "gross income from mining" (the depletion base) can be computed.

The statutory definition of "mining" was interpreted and applied by this Court in *United States* v. *Cannelton Sewer Pipe Co.*, 364 U.S. 76, where the taxpayer was an integrated miner-manufacturer which mined fire clay and shale and used them to make sewer pipe. In rejecting the taxpayer's contention that "mining" included all of the processes utilized in making sewer pipe, this Court held that the reference in the statutory definition to the "commercially marketable mineral product" does not mean that the particular taxpayer must be able to sell the mineral at a profit; that integrated operators provide their own market for the mineral they mine; that "mining" terminates when the mineral first reaches the stage where it is fit for industrial use or consumption; and that the cut-off was evidenced by proof of sales of fire clay and shale (without any processing at all) by ordinary, non-integrated, run-of-the-mill miners. Accordingly, it was held that Cannelton's "gross income from mining" should be constructively computed on the basis of raw fire clay and shale.[1] In *Riddell* v. *Monolith Portland Cement*

[1] This computation is made in accordance with pertinent Treasury Regulations which provide for use of the representative market price of the mineral of like kind and grade; if there is such a price, and, if not, by using as the gross

Co., 371 U.S. 537, this Court, applying *Cannelton* to limestone mined by a cement manufacturer, held that "mining" terminated at the crushed limestone stage and that the taxpayer's depletion base (its "gross income from mining") was limited to its constructive income from crushed limestone, rather than from finished cement.

The present taxpayer produces two types of salt by hydraulic mining (brine wells) and another type by dry mining (rock salt mining); in doing so it uses numerous processes, which are set out in a table in the opinion below. (Pet. 48). The Commissioner allowed the taxpayer a depletion allowance which was computed by using, as the cutoff points to "mining", step 6 for the two types of evaporated salt and step 7 for the rock salt. (Pet. 49, fn. 6.) The taxpayer filed claims for refund and instituted this suit on the theory that its depletion base (its "gross income from mining") was the gross income it derived from its finished products—packaged salts. The sole issue presented for decision, as the court below stated (Pet. 47), was as to the cutoff point to mining, *i.e.*, whether all of the numerous processes used by the taxpayer were included in the statutory definition of "mining." The court below considered *Cannelton* controlling and, applying it in the light of sales of brine at step 6 and rock salt at step 7, held that the proper cutoff

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income from mining that percentage of the sales price of the product sold which the costs of mining bear to the total costs of the product sold (called the "proportionate profits" method). See, *e.g.*, *Treasury Regulations* 111, Section 29.23 (m)-1(f), set forth in the petition at pages 25-30.

points to mining were no later than those used by the Commissioner, and that the cutoff point might have been sooner in the case of evaporated salts. (Pet. 51-54.) This disposed of the only issue before the court.

Since the decision below is squarely based upon *Cannelton*, we fail to understand the taxpayer's assertion (Pet. 12-13) that the decision is in conflict with *Cannelton* and *Monolith*. The assertion appears to have reference (see Pet. 13) to application of the "proportionate profits" formula, which, as previously indicated (fn. 1, *supra*, pp. 2-3), is a method of constructively computing the gross income from mining after the cutoff point to mining has been determined. The application of that formula was not in issue and was not decided by the court below. The sole issue, as already stated, was as to the cutoff point to mining.

The alleged conflict (Pet. 10-12) between the decision below and *Alabama By-Products Corp.* v. *Patterson*, 258 F. 2d 892 (C.A. 5th), certiorari denied, 358 U.S. 930, is also non-existent. The latter decision involved the application of the "proportionate profits" formula, an issue not decided below.

Townsend v. *Hitchcock Corp.*, 232 F. 2d 444 (C.A. 4th), and *New Idria Quicksilver Min. Co.* v. *Commissioner*, 144 F. 2d 918 (C.A. 9th), with which the decision below is also alleged to be in conflict on the cutoff issue (Pet. 14-15), are pre-*Cannelton* decisions.

For the same reason, the taxpayer is incorrect in its assertion (Pet. 8-10) that the case involves an important question as to the proper application of the "proportionate profits" formula.

Accordingly, to the extent they are inconsistent with *Cannelton* and the application of *Cannelton* in the present case, they are no longer authoritative.

The instant case has been decided in strict conformity with the controlling decisions of this Court and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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